90-540
NO.

IN THE SUPREME COURT OF THE UNITED STATES

TERM, 1990

VINCENT J. VACCARO,

PETITIONER,

-v-

THOMAS C. JORLING, AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK THIRD JUDICIAL DEPARTMENT

DANIEL S. COHEN, Esq.
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QUESTION PRESENTED

Is the proposed taking of Petitioner's real property reasonably necessary for the public use?

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RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Daniel S. Cohen, Esq., on behalf of Vincent J. Vaccaro ("Petitioner"), petitions for a writ of certiorari to review the JUDGMENT of The New York State Court of Appeals, Appellate Division, Third Department (the "Appeals Court") in this action ("This Action").

OPINIONS BELOW

The opinion of the Appeals Court dated

October 19, 1989, appears in the Appendix to this Petition. In the opinion, the Appeals Court confirmed the determination of Respondent and dismissed the Petitioner's Petition for review of the determination pursuant to New York Eminent Domain Procedure Law, Art. 2. The New York State Court of Appeals dismissed sua sponte Petitioner's appeal as of right, without opinion, by Order dated April 3, 1990. The New York Court of Appeals dismissed Petitioner's motion for leave to appeal by Order dated June 28, 1990.

JURISDICTION

The Judgment of the Appeals Court dated October 19, 1990 and dismissal of Petitioner's appeals by the New York State Court of Appeals dated April 3, 1990 and June 28, 1990 appear in the Appendix to this Petition. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of The United States provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the Constitution of The United States provides as follows:

> "Section 1. Citizens of the United States. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States

> and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Section 7 of The Bill of Rights to The New York State Constitution provides as follows:

> "(a) Private property shall not be taken for public use without just compensation."

STATEMENT OF THE CASE

On December 22, 1988, Respondent Thomas C. Jorling, as the Commissioner of The New York State Department of Environmental Conservation (the "Commissioner"), made a determination to acquire by eminent domain, Petitioner's Adirondack Park land, consisting of 1036 ± acres located at Pine Lake, Hamilton County, New York (the "Petitioner's property). The Commissioner's Findings and

Determinations, which were issued after public hearing, gave the following reasons for the "taking".

a. Consolidating state-owned Forest Preserve lands;

b. Providing additional recreational opportunities for the public;

c. Eliminating administrative and environmental problems associated with increased usage of an access road;

d. Protecting the natural resources of the property from further development.

(Appendix, pgs. 38-44, at pg. 43)

Prior to the commencement of a proceeding in The Supreme Court of the State of New York, Appellate Division, Third Department for a review of the Commissioner's Determination pursuant to New York State's Eminent Domain Procedure Law (the "E.D.P.L."), Petitioner offered the State of New York a nondevelopment, conservation easement and a right of first refusal in the event Petitioner's property was to be sold or

transferred. The Commissioner rejected Petitioner's proposals and has continued to proceed with the plan to acquire Petitioner's property by eminent domain.

Further, in the DEC Administrative Law Judge's report to the Commissioner, the Judge concluded:

> "Although there is some support for the proposed action, the overwhelming sentiment of the public which participated in the hearing process is that there is nothing particularly unique about the properties, and no public need which will be served, sufficient to justify appropriation under the EDPL. Acquisition is generally viewed to benefit, not millions of citizens of the state, but only those few recreationists who may be able to travel to, and are physically capable of negotiating, the properties. It is generally perceived that any benefit from the proposed acquisitions through the use of eminent domain would be far outweighed by adverse impacts on real estate transactions, private management of lands, the forest products industry, and citizens' "sense of security" in the proper functioning of their government. (emphasis in original)

Despite Petitioner's proposals to the Commissioner, overwhelming public sentiment and the recommendations of the Administrative Law Judge, the Commissioner continues to pursue the Petitioner's property by eminent domain.

Petitioner commenced an action in The New York State Supreme Court, Appellate Division, Third Department for a review of the determination by the Commissioner to take Petitioner's property pursuant to New York State Eminent Domain Procedure Law, Art. 2. In an opinion dated October 19, 1989, the Third Department rejected Petitioner's arguments that the Commissioner had exceeded his authority in ordering the appropriation of Petitioner's property and in the absence of an express statutory grant of eminent domain, its use is improper. The Court also rejected Petitioner's argument that the power of eminent domain was improperly exercised because the land was not unique or threatened. Lastly, the Court rejected

Petitioner's argument that the appropriation was unconstitutional on the ground that the acquisition failed to qualify as a public use.

The New York State Court of Appeals dismissed sua sponte Petitioner's appeal as of right, without opinion by Order dated April 3, 1990. The New York State Court of Appeals dismissed Petitioner's motion for leave to appeal by Order dated June 28, 1990.

REASONS FOR GRANTING THE PETITION

I. The New York Appellate Court's determination that the taking of Petitioner's property was necessary for a public use was arbitrary and capricious and deprived Petitioner of due process of law.

Petitioner contends that the exercise of eminent domain by the Commissioner with regard to Petitioner's property will deprive Petitioner of his property without due process of law, in violation of the Fourteenth Amendment.

The Commissioner has listed several reasons for the "taking", which include: 1. Consolidating state-owned Forest Preserve lands; 2. Providing additional recreational opportunities for the public; 3. Eliminating administrative and environmental problems associated with increased usage of an access road; and 4. Protecting the natural resources of the property from further development. The Commissioner, however, has failed to demonstrate that such a taking of private property is a necessary public use and within the parameters of the Fourteenth Amendment.

In Cincinnati v. Vester, 281 U.S. 439, 446 (1930), The Court stated that:

> "It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one."

The New York State Supreme Court, Appellate Division refused to address the factual issue of public use or necessity, but merely restated the Commissioner's reasons for the

taking in contravention of Petitioner's Fourteenth Amendment rights.

Petitioner contends that the proposed taking will not further any legitimate public purpose. New York State currently owns approximately 729,000 acres of the existing 1,140,000 million acres within Hamilton County, where Petitioner's property is located. The Commissioner has stated that one of its objectives is to consolidate state-owned Forest Preserve. The State, however, owns more than sixty-six percent (66%) of the property within Hamilton County. The State has interpreted consolidation in such a manner as to make State ownership of land an end unto itself, rather than a means to a public purpose.

The Commissioner has further stated that the taking of Petitioner's property will provide additional recreational opportunities for the public. If this reason alone constitutes a legitimate public purpose, than all of the land in the

Adirondacks can be taken for any reason or, as in this instance, no reason. The Commissioner has not offered any theory for the taking based upon the uniqueness of Petitioner's property, special ecological features of Petitioner's property or abuse of Petitioner's property by the present owners. The Commissioner merely seeks to eliminate any private refuge or ownership within its vast holdings in the Adirondack Park.

The Commissioner has also stated that the taking of Petitioner's property will eliminate administrative and environmental problems associated with increased usage of the access road. First, the Commissioner has not demonstrated that there has been, or will be, any increased usage of the access road under Petitioner's ownership. Second, this statement contradicts one of the supposed "reasons" for the taking, to provide additional recreational opportunities to the public. If the Commissioner seeks to eliminate increased usage of the access road,

how will the taking of Petitioner's property create additional recreational opportunities for the public.

Finally, the Commissioner advances the theory that the taking of Petitioner's property will protect the natural resources from further development. Petitioner is a conservationist and environmentalist whose purpose in purchasing his property was to maintain its pristine beauty. Petitioner has offered the Commissioner a conservation, non-development easement and a right of first refusal to purchase Petitioner's property to insure against any development. Further, the Bagg family, who has owned and maintained a life estate with regard to Petitioner's property for over one hundred years, has continually maintained Petitioner's property. The Commissioner has been assured that continual ownership by Petitioner will not result in development.

Thus, it is clear that the Commissioner's actual purpose for acquiring

Petitioner's property is to eliminate private use and private ownership. By failing to advance any logical, supportable reason for the acquisition of Petitioner's property, The Commissioner exposes the fallacy of the "public purpose" taking.

The Court in Cincinnati v. Vester, 281 U.S. at 447 held that:

> " . . . it would seem to be clear that a mere statement by the council that the excess condemnation is in furtherance of such use would not be conclusive. Otherwise, the taking of any land in excess condemnation, although in reality wholly unrelated to the immediate improvement, would be sustained on a bare recital. This would be to treat the constitutional provision as giving such a sweeping authority to municipalities as to make nugatory the express condition upon which the authority is granted."

In the present case, the Commissioner failed to demonstrate any level of need for the acquisition of Petitioner's property, but rather based its eminent domain proceeding on the bare recital of public use. Not only did

the Commissioner not demonstrate any need, it also provided no evidence to substantiate its theory that Petitioner's property was necessary to fulfill that need. In Cincinnati v. Vester, the Court held that the municipality must specify definitely the purpose of the appropriation. Id. The Court stated that:

> "[t]he importance of the definition of purpose would be even greater in the case of taking property not directly to be occupied by a proposed public improvement . . ."

Id.

The New York Court of Appeals has also held that the "public use/necessity requirement has not been eliminated, although the historical requirement that the taking must be constitutionally necessary has been watered down by virtue of the fact that judicial deference is given to the legislature in matters of necessity.

In the context of an urban renewal condemnation case, the Court of Appeals in

Yonkers Community v. Morris, 37 N.Y.2d 478 (1975) has analyzed the "public purpose" rule as follows:

> "However, even where the law expressly defines the removal or prevention of "blight" as a public purpose and leaves to the agencies wide discretion in deciding what constitutes blight, facts supporting such a determination would be spelled out. It may be that plaintiff here would have no difficulty in doing so in its papers or by way of proof. It did not do so.
>
> Here, other than the agency's bare pleading of its "substandard" finding, it provided no further data as to the condition of the area, except for the general statement that at least 50% of the structures in the area are "substandard", a figure which, as defendants point out, did no more than coincide with the figure found in an earlier comprehensive city plan, which had designated the area here involved as suitable for rehabilitation rather than clearance. No more can be found in the rest of the agency's supporting papers. They supply only information about the improvements which will be made by Otis after it receives the land and the conditions placed upon Otis' subsequent use of the land.

The agency has not indicated in any manner the grounds upon which it concluded that the land is presently substandard. Indeed, in its reply to defendants' claims, the agency states that its findings in this regard are conclusive and establish a public purpose as a matter of law.

Extensive review of the case law both in New York and in our sister States regarding the proper scope of review which courts may apply to such agency findings reveals that, even where courts stated most strongly that their role in reviewing agency findings was a circumscribed one, more was required to be submitted to the courts than the agency has supplied here. (citations omitted)

Carefully analyzed, it is clear that in such situations, courts are required to be more than rubber stamps in the determination of the existence of substandard conditions in urban renewal condemnation cases. The findings of the agency are not self-executing. A determination of public purpose must be made by the courts themselves and they must have a basis on which to do so. (Denihan Enterprises v. O'Dwyer, 302 NY 451 (1951) Yonkers Community v. Morris, 37 N.Y.2d 478 at 484-485.

In fact, the statutory scope of review

as is set forth in E.D.P.L. Section 207(A) and (4) encompasses a review for "conformity with the federal and state constitutions" and whether "a public use will be served." Under state constitutional law, the agency is required to present the Court with an "adequate basis" for its conclusion of necessity, and, although the review is less than a "de novo" review of the facts, the Court of Appeals has expressly noted that E.D.P.L. Section 207 requires more than the "rational basis" standard imposed under the federal constitution. Jackson v. N.Y. Urban Dev. Corp., 67 N.Y.2d 400, 424-425.

Under any semblance of review, a conclusion of no necessity is irrefutable. There simply is no "necessity" for the proposed "public use" of Petitioner's property. Neither is there a "rational basis" nor an "adequate basis" offered to support the bald conclusions of the Commissioner. This was substantiated previously by the review of the

Commissioner's findings and determinations compared with the constitutional standard of "necessity" and the statutory E.D.P.L. Section 207(c)(4) standard of "public use."

Finally, the New York Court of Appeals confirmation of the taking of Petitioner's property was without rational basis and was arbitrary and capricious. The Commissioner offered no evidence to substantiate the constitutional standard of "necessity". Federal Courts, including the Supreme Court, have consistently held that judicial review is available where the administrative decision to condemn a particular property is alleged to be arbitrary, capricious or in bad faith. United States v. Carmack, 329 U.S. 230, 243-244 (1946); Southern Pacific Land Company v. U.S., 367 F.2d 161, 162 (9th Cir. 1966). Thus, judicial review is available with regard to the present use.

CONCLUSION

The Commissioner failed to demonstrate a legitimate "necessity" or public purpose for the proposed taking of Petitioner's property. Without further judicial review, Petitioner's constitutional rights will have been violated under the United States Constitution. For all of the reasons set forth herein, Petitioner's writ of certiorari should be granted.

Respectfully submitted,

DANIEL S. COHEN, Esq.
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Utica, New York 13501
(315) 724-4151

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-eighth day of June A.D. 1990

STATE OF NEW YORK,
COURT OF APPEALS

PRESENT, HON. SOL WACHTLER, Chief Judge, presiding.

Mo. No. 497
In the Matter of Vincent J. Vaccaro,

Appellant,

v.

Thomas C. Jorling, as Commissioner & c.,

Respondent.

(Proceeding No. 1)

In the Matter of Egbert Bagg, IV et al.,

Petitioners,

v.

New York State Department of Environmental Conservation,

Respondent.

(Proceeding No. 2)

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having

been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

_____
Donald M. Sheraw
Clerk of the Court

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the third day of April A.D. 1990

STATE OF NEW YORK,
COURT OF APPEALS

PRESENT, HON. SOL WACHTLER, Chief Judge, presiding.

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3 Mo. No. 334 SSD 20
In the Matter of Vincent J. Vaccaro,

Appellant,

v.

Thomas C. Jorling, as Commissioner & c.,

Respondent.

(Proceeding No. 1)

In the Matter of Egbert Bagg, IV et al.,

Petitioners,

v.

New York State Department of Environmental Conservation,

Respondent.

(Proceeding No. 2)

The appellant having filed notice of appeal in Proceeding No. 1 and due consideration having been thereupon had, it is

ORDERED, that the appeal in Proceeding

No. 1 be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Stuart M. Cohen
Deputy Clerk of the
Court

Supreme Court - Appellate Division
Third Judicial Department

October 19, 1989 58254

In the Matter of VINCENT J. VACCARO,

Petitioner,

v.

THOMAS C. JORLING, as Commissioner of the New York State Department of Environmental Conversation,

Respondent.

(Proceeding No. 1)

In the Matter of EGBERT BAGG, IV et al.,

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondent.

(Proceeding No. 2)

OPINION

Argued, September 11, 1989.

Before:

HON. LEONARD A. WEISS,
Justice Presiding,
HON. ANN T. MIKOLL,
HON. PAUL J. YESAWICH, JR.,
HON. THOMAS E. MERCURE,
HON. NORMAN L. HARVEY,
Associate Justices.

PROCEEDINGS initiated in the Appellate Division of the Supreme Court in the Third Judicial Department pursuant to EDPL 207 to review a determination of respondent Commissioner of Environmental Conservation which authorized the acquisition of certain real property.

EVANS, SEVERN, BANKERT & PEET (Thomas F. O'Donnell of counsel), 231 Genesee Street, Utica, New York 13501, for petitioner in proceeding No. 1.

C. GORDON DAVIS, P.O. Box D-1, Church Street Office Building, Elizabethtown, New York 12932, for petitioners in proceeding No. 2.

ROBERT ABRAMS, Attorney-General (John J. Pickett of counsel), The Capitol, Albany, New York 12224, for respondent.

MIKOLL, J.

Petitioners Egbert Bagg, IV and Caroline Bagg Monson are holders of life estates in certain real property consisting of approximately 1,063 acres, commonly known as the Pine Lake property, in Hamilton County in the Adirondack Park. The subject property comprises forest lands, Pine Lake and Little Pine Lake, several camps and a portion of the South Branch of West Canada Creek. The latter has been designated a wild river pursuant to ECL 15-2714 (1) (g). The Pine Lake property is completely surrounded by State-owned land designated "wild forest" and has a high priority for acquisition for State land consolidation purposes. After several years of negotiations to purchase the property, respondent Department of Environmental Conservation (hereinafter DEC), notified petitioner Vincent J. Vaccaro, the owner in fee, of the proposed eminent domain appropriation and offered to purchase the property for $340,000. Vaccaro declined this

offer.

After a public hearing held pursuant to EDPL article 2 at which, inter alia, hundreds of written statements and petitions signed by over 1,300 persons were submitted in opposition to the appropriation, respondent Commissioner of Environmental Conservation (hereinafter the Commissioner) found that the subject properties were "entirely surrounded by state-owned Forest Preserve lands" and that appropriation of the property would accomplish DEC objectives by:

a. Consolidating state-owned Forest Preserve lands;

b. Providing additional recreational opportunities for the public;

c. Eliminating administrative and environmental problems associated with increased usage of an access road;

d. Protecting the natural resources of the property from

further development.

The Commissioner ordered the appropriation of the Pine Lake property, subject to the life estates of Bagg and Monson. Petitioners then commenced the present proceedings challenging the Commissioner's determination.

Initially, we find merit to the Commissioner's contention that Bagg and Monson, petitioners in proceeding No. 2 and the owners of a life estate in the Pine Lake property, are not aggrieved persons under EDPL 207 (a) because the appropriation was expressly made subject to their interest. Bagg's and Monson's life-estate interest is an exclusive right of use and possession of approximately eight acres of the Pine Lake property with certain nonexclusive rights in the remaining 1,055 acres. The nonexclusive rights include the right to use a water supply, certain easement rights of egress and ingress, the rights to boat on Pine Lake and to hunt, fish and cut firewood on the remainder of the property.

The Commissioner's determination expressly provides that the life estate will be honored and makes the appropriation subject to those rights. Since their life tenant exclusive rights have been preserved, Bagg and Monson are not aggrieved by the Commissioner's determination as to that part of their interest. Their claim concerning their nonexclusive rights in the remainder of the property is, in essence, in the nature of an easement right over the property for the duration of their life estate interest. As such, they lack the legal power to prohibit general use or enjoyment of the property by the owner in fee (see, Rahabi v. Morrison, 81 AD2d 434, 440). Their nonexclusive rights are subject to the fee owner's "right to use its land in any manner that does not unreasonably interfere with the rights of the owner of the easement" (Wechsler v. People, 147 AD2d 755,757). Thus, the proposed use by the State, as owner in fee, to allow the public access to the remaining property does

not deprive Bagg and Monson of any legal right or unreasonably interfere with their interests in that portion of the Pine Lake property (see, id.). Accordingly, Bagg and Monson have failed to demonstrate that they are aggrieved under EDPL 207 (a) by the Commissioner's determination and the petition in proceeding No. 2 should be dismissed.

Turning to the merits in proceeding No. 1, we reject Vaccaro's argument that the Commissioner exceeded his authority in ordering the appropriation of the Pine Lake property because eminent domain does not apply to lands within the Adirondack forest preserve which are not unique or threatened. In Matter of Bath & Hammondsport R.R. Co. v New York State Dept. of Envtl. Conservation (73 NY2d 434), the Court of Appeals interpreted the word "acquire" used in ECL 3-0305 (1) as authorizing the condemnation of land for the establishment of fish and wildlife areas as set forth in ECL 11-2103 (id., at 438-440).

We also find unpersuasive Vaccaro's contention that, despite the fact that DEC here seeks to acquire the Pine Lake property to accomplish certain DEC objectives, including consolidation of State-owned forest preserve lands and protection of natural resources from further development, the absence of an express statutory grant of eminent domain requires that exercise of that power be strictly construed, and, thus, its use here is improper. The absence of a specific reference to eminent domain in ECL 9-0105 (7) does not preclude the Commissioner from appropriating land to accomplish DEC's objectives of enlarging and protecting the Adirondack forest preserve. The term "acquire" as used in ECL 9-0105 (7) includes the power of eminent domain to achieve the objectives stated in ECL 9-0105 (7).

We next reject Vaccaro's argument that the power of eminent domain was improperly exercised in this case because the 1972 Environmental Quality Bond Act (see, ECL art

51) (hereinafter Bond Act) envisions the appropriation of land which is unique and threatened and that there is not an adequate basis to make such a finding. The implementing legislation of the Bond Act allocated funds, inter alia, for both forest preserve projects in the Adirondack Park and unique area preservation projects (see, ECL 51-0701 [1], [3]). The funds appropriated for unique areas are, by definition, for land outside the Adirondack Park (see, ECL 51-0703 [4]). By contrast, the "Forest Preserve Project" is a project directed expressly for the acquisition of lands as additions to the forest preserve within the Adirondack Park. Therefore, petitioners' reliance on the Bond Act as allocating funds exclusively for unique areas of land within the Adirondack Park is unsound and inconsistent with the statutory language of ECL article 51. Vaccaro's reliance on the Governor's memorandum (see, Governor's Mem, 1972 NY Legis Ann, at 364) is misplaced since,

contrary to his assertion, the memorandum is susceptible to a broader interpretation than a reference to "unique" areas only. In any event, an executive memorandum cannot vary the plain meaning of a statute, here ECL 51-0703 (4) (see, e.g., People v Graham, 55 NY2d 144, 151).

Finally, Vaccaro's constitutional arguments for voiding the appropriation of the Pine Lake property as unconstitutional on the ground that the acquisition fails to qualify as a public use are also without merit. The constitutional requirement that a taking by eminent domain be for a public purpose has been satisfied. Enlargement of the Adirondack forest preserve is a public use expressly authorized by ECL 3-0305 (1) and 9-0105, and legislatively funded by ECL 51-0701 (1). Several public purposes previously mentioned are accomplished by this appropriation. Further, this appropriation will furnish additional recreational opportunities for the public. The record

supports the finding that the appropriation in fee, instead of some less restrictive means, was necessary to effectuate the objectives enumerated in ECL 9-0105 (7).

The appropriation of the subject property by eminent domain is supported by an adequate basis and has not been shown to be unreasonable or arbitrary (see, Long Is. R.R. Co. v Long Is. Light Co., 103 AD2d 156, 168, affd 64 NY2d 1088; see also, Town of New Windsor v City of Newburgh, 124 AD2d 656, 17 Carmody-Wait 2d, NY Prac Section 108.86, at 564-565).

We have examined Vaccaro's other arguments for invalidating the Commissioner's determination and find them without merit.

Opinion by MIKOLL, J., in which WEISS, J.P., YESAWICH, JR., MERCURE and HARVEY, JJ., concur.

Determination confirmed, without costs, and petitions dismissed.

PROJECT: Q-AFP Hamilton 164 ("Pine Lake Property")
Q-AFP Hamilton 284 ("L-D Pond Property")

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

IN THE MATTER OF the proposed Acquisition of 2,306 acres of forest land in the Townships of Morehouse and Arietta, Hamilton County, New York	COMMISSIONER'S FINDINGS AND DETERMINATION

PURSUANT to the Eminent Domain Procedure Law, Article 2, the New York State Department of Environmental Conservation ("Department"), scheduled a public hearing on August 11, 1988 at 1:00 p.m. before Frank Montecalvo, the undersigned's duly designated representative and Administrative Law Judge, to obtain public comment from any and all persons interested in the proposed acquisition of 1036 acres of forest land in the Town of Morehouse, Hamilton County referred to as the Pine Lake Property and of 1,243 acres of forest land in the Town of Arietta, Hamilton County referred to as the L-D Pond Property.

WHEREAS, said hearing was held on August 11, 1988 and the hearing record was closed on September 23, 1988. The Administrative Law Judge has submitted to the undersigned, the stenographic record of such hearing as well as the Administrative Law Judge's hearing report. Subsequently, Department Staff have submitted comments and recommendations; and

WHEREAS, the Legislature in enacting the Environmental Quality Bond Act of 1986 found that the protection of land is important to the long-term preservation, enhancement, restoration and improvement of the quality of the environment of the State; and

WHEREAS, The Department has authority to acquire land by eminent domain pursuant to Environmental Conservation Law 3-089 and Environmental Conservation Law Article 9; and

WHEREAS, acquisition of Forest Preserve land serves a public purpose in accordance with Article XIV of the New York

State Constitution.

HAVING considered the record and the entire projects herein, my findings are that:

1. The Administrative Law Judge's report is accepted.

2. The owners of the L-D Pond Property have since the date of the hearing entered into a purchase contract with the State of New York.

3. The hearing report shows that the Department proposes to acquire in fee the Pine Lake Property in order to avoid the possibility of substantially increased fording of the South Branch of the West Canada Creek, to consolidate State land, eliminate administrative and environmental problems associated with increased usage of an access road, to protect the natural resources of the property from further development and to provide additional recreational opportunity for the public. Thus, a public use would be provided for and a public benefit would result from

acquisition by the State of this land and its preservation in our Forest Preserve, regardless of the availability of other land for acquisition or the existence of other land in the Forest Preserve.

4. The Pine Lake Property is located in Lots 87, 88, 93, 94 and 99 located in the northern half of Arthurboro Patent, Town of Morehouse and consists of approximately 1,063 acres of forest lands, Pine Lake, Little Pine Lake and several camps.

5. The L-D Pond Property is located in Lots 229 and 230 located in the Oxbow Tract, Town of Arietta and consists of 1,243 acres of forest land.

6. The hearing report shows that there was public support for the proposed acquisitions by persons appearing at the hearing and by not-for-profit associations representing numerous members, and that the sentiment of most of the public which attended the hearing was that there is no public need which will be served sufficient

to justify appropriation under the EDPL.

7. The environmental impacts of the proposed projects have been addressed in compliance with Article 8 of the Environmental Conservation Law as implemented by Part 617 New York Code of Rules and Regulations by completion of and compliance with a Final Environmental Impact Statement entitled Acquisition of Forest Preserve Lands Under the 1972 Environmental Quality Bond Act, March 30, 1981.

NOW THEREFORE, my determination based upon the hearing record, the Administrative Law Judge's Report and comments received from Department staff is as follows:

1. All procedural and substantive requirements of Article 2 of the Eminent Domain Procedure Law as it relates to the acquisition have been complied with.

2. The parcels comprising the forest land are entirely surrounded by state-owned Forest Preserve lands. Appropriation, as proposed, would accomplish the Department's

objectives by:

a. Consolidating state-owned Forest Preserve lands;

b. Providing additional recreational opportunities for the public;

c. Eliminating administrative and environmental problems associated with increased usage of an access road;

d. Protecting the natural resources of the property from further development.

3. The life estate enjoyed by Egbert Bagg III and Caroline Bagg Monson on a portion of the Pine Lake Property will be honored and the appropriation will be subject to these rights.

4. The L-D Pond Property will not be included in this acquisition so long as title is vested to the state prior to the acquisition of the Pine Lake Property.

On the basis of the foregoing, IT IS HEREBY

ORDERED THAT all remaining necessary administrative actions be taken by the Department of Environmental Conservation to vest title to the above described Pine Lake Property, and the L-D Pond Property if title is not voluntarily transferred.

IN WITNESS WHEREOF, the Department of Environmental Conservation has caused this Decision to be signed and issued and has filed the same with all maps, papers, reports and other papers relating thereto in its office in Albany, New York on this 22 day of December 1988.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION

THOMAS C. JORLING, COMMISSIONER
